

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

Pending before the Court is Plaintiffs Thomas Howard and Robert Weldy's Motion to Alter and Amend Pursuant to FRCP 59. (ECF No. 33.) For the reasons set forth below, the Motion is denied.

## I. BACKGROUND

This suit is a Medicare/Medicaid fraud *qui tam* action brought under the False Claims Act (“FCA”). Plaintiffs brought suit on behalf of the United States Government as authorized by the FCA, and after the Government elected not to intervene, Plaintiffs continued to conduct the action on the Government’s behalf. The facts of the case are set forth in the Court’s prior Order dated December 26, 2012, (ECF No. 32), in which the Court granted Defendant Shoshone Paiute Tribes, Duck Valley Indian Reservation’s (“Defendant”) Motion to Dismiss. In that Order, the Court determined that Defendant, due to its tribal immunity as an Indian Tribe, was not a “person” subject to liability under the FCA when a suit was maintained by private citizens and not the United States Government. Plaintiffs brought this Motion shortly thereafter for alteration and amendment of the Order. Although the Motion neither specifies what specific alterations or amendments Plaintiffs seek nor requests action from the Court, the content and timing

1 of the complaint suggest Plaintiffs seek reversal of the Court's prior Order and relief from  
2 the dismissal of their complaint. Thus, the Court construes the Motion as one for  
3 reconsideration.

4 **II. LEGAL STANDARD**

5 Although not mentioned in the Federal Rules of Civil Procedure, motions for  
6 reconsideration may be brought under Rules 59(e) and 60(b). *Sch. Dist. No. 1J,*  
7 *Multnomah Cnty., Or. v. ACandS, Inc.*, 5 F.3d 1255, 1262 (9th Cir. 1993). Rule 59(e)  
8 provides that any motion to alter or amend a judgment shall be filed no later than 28 days  
9 after entry of the judgment. Fed. R. Civ. P. 59(e). The Ninth Circuit has held that a Rule  
10 59(e) motion for reconsideration should not be granted "absent highly unusual  
11 circumstances, unless the district court is presented with newly discovered evidence,  
12 committed clear error, or if there is an intervening change in the controlling law." *Marlyn*  
13 *Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, 571 F.3d 873, 880 (9th Cir. 2009)  
14 (quoting *389 Orange Street Partners v. Arnold*, 179 F.3d 656, 665 (9th Cir. 1999)).  
15 Evidence that was available to a party at the time it filed its opposition is not "newly  
16 discovered evidence." See *Sch. Dis. No. 1J*, 5 F.3d at 1263.

17 A motion for reconsideration must set forth the following: (1) some valid reason  
18 why the court should revisit its prior order; and (2) facts or law of a "strongly convincing  
19 nature" in support of reversing the prior decision. *Frasure v. United States*, 256 F. Supp.  
20 2d 1180, 1183 (D. Nev. 2003). It is not a mechanism for re-arguing issues presented in  
21 the original filings, *Backlund v. Barnhart*, 778 F.2d 1386, 1388 (9th Cir. 1985), or  
22 "advancing theories of the case that could have been presented earlier, *Resolution Trust*  
23 *Corp. v. Holmes*, 846 F. Supp. 1310, 1316 (S.D. Tex. 1994) (footnotes omitted). In other  
24 words, Rule 59(e) is not "intended to give an unhappy litigant one additional chance to  
25 sway the judge." *Durkin v. Taylor*, 444 F. Supp. 879, 889 (E.D. Va. 1977).

1                   III. DISCUSSION

2                   Plaintiffs bring two main arguments to support their Motion for Reconsideration.

3                   First, Plaintiffs argue that Defendant's 1936 Corporate Charter is newly discovered  
4                   evidence that indicates that the Tribe may have voluntarily waived its immunity.

5                   Plaintiffs subsequently contend that they should be given permission to conduct  
6                   discovery as to whether Defendant had waived its tribal immunity. Second, Plaintiffs  
7                   argue that the allegations of Medicare fraud contained in the complaint necessitate that  
8                   the operative definition of "person" for the purpose of liability is that contained in 42  
9                   U.S.C. 1320a-7a (the "Medicare Statute") as opposed to that contained in the FCA.

10                  Plaintiffs further argue that the Medicare Statute's definition of "person" would  
11                  encompass an Indian Tribe. The Court discusses each argument in turn.

12                  Plaintiffs' discovery argument fails to meet the standard for reconsideration under  
13                  Rule 59(e). First, the Court does not see how the 1936 Corporate Charter is newly  
14                  discovered evidence. The Charter is a public document available to Plaintiffs at the time  
15                  of the filing of their opposition. As such, it is not newly discovered evidence.  
16                  Furthermore, by Plaintiffs' own admission, the Charter only evidences that there *may* be  
17                  a waiver of sovereign immunity such that "Plaintiff[s] should be able to do discovery to  
18                  determine whether Defendant has waived sovereign immunity." Plaintiffs have not  
19                  identified any specific information they think they may discover and how that  
20                  information would establish waiver. Thus, even if the Charter was newly discovered  
21                  evidence, it could only be used to launch a fishing expedition to hopefully recover some  
22                  information about waiver. Such a circumstance does not present a valid reason to reverse  
23                  the Court's prior decision.

24                  Additionally, Plaintiffs were fully apprised of Defendant's defenses of tribal  
25                  sovereign immunity and non-personhood under the FCA at the time of filing of their

1 Opposition, but failed to argue waiver or the need for additional discovery in their  
2 Opposition. Plaintiffs also had the opportunity to raise the discovery issue before the  
3 Magistrate Judge at the Scheduling Conference where the issue of discovery during the  
4 pendency of the Motion to Dismiss was discussed.<sup>1</sup> Consequently, both Plaintiffs'  
5 arguments regarding the voluntary waiver and the need for additional discovery—  
6 advanced for the first time in this Motion—constitute new theories of the case, which  
7 could have been presented earlier. Such new theories are improper in a Motion for  
8 Reconsideration.

9 Plaintiffs' second argument likewise fails to meet the Rule 59(e) standard.  
10 Applying the Medicare Statute's definition of "person" is not an intervening change in  
11 law, both the FCA and the Medicare Statute is the same now as it was at the time of the  
12 filing of Plaintiffs' Opposition. Rather, this argument is also a new theory that may have  
13 been presented in Plaintiffs' Opposition but is only now advanced. Thus, it is improperly  
14 raised in a Motion for Reconsideration. More fundamentally though, Plaintiffs' claims in  
15 their Complaint are for violations of the FCA, not the Medicare Statute. In fact, Plaintiffs  
16 cannot bring a claim under the Medicare Statute, because the Medicare Statute does not  
17 authorize *qui tam* suits or private actions. Consequently, the FCA is the congressionally  
18 authorized mechanism by which Plaintiffs may bring claims on behalf of the United  
19 States, and its provisions are operative in determining persons who may be found liable  
20 in such suits. The definition of "person" in the Medicare statutes is inapplicable.

21 Plaintiffs have neither provided any newly discovered evidence nor demonstrated  
22 a clear error in the Court's prior holding. Additionally, there has been no intervening  
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25 <sup>1</sup> In fact, the Magistrate Judge specifically inquired whether or not Plaintiffs needed to conduct limited  
discovery for jurisdictional purposes while the Motion to Dismiss was pending and Plaintiffs' counsel  
represented that no such discovery was required. (ECF No. 31, 35-1.)

1 change in the law. Thus, there is not a valid reason to reverse the Court's prior Order and  
2 Plaintiffs' Motion must be denied.

3 **IV. CONCLUSION**

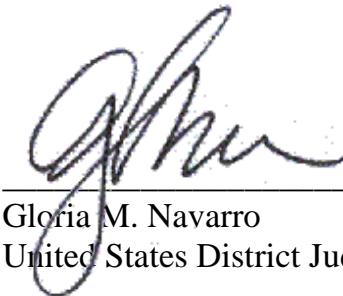
4 **IT IS HEREBY ORDERED** that Plaintiffs Thomas Howard and Robert Weldy's  
5 Motion to Alter and Amend Pursuant to FRCP 59 (ECF No. 33) is DENIED.

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7 DATED this 17th day of May, 2013.

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Gloria M. Navarro  
United States District Judge

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